UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

HUGHES SUPPLY, INC.
Employer

and Case 25-RC-10209

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL UNION NO. 414, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on June 9, 2006, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[1]

I. ISSUE

The parties entered into a Stipulated Election Agreement approved by the Regional Director on December 16, 2003. While an election was originally scheduled for January 6, 2004, the election was not held as scheduled due to the filing of an unfair labor practice charge that blocked the processing of the present election Petition. Following the resolution of the unfair labor practice charge, processing of the Petition resumed. However, in the interim time since the Stipulated Election Agreement was approved, the Employer asserts that the stipulated bargaining unit has eroded to only one employee, and that the Board cannot certify a bargaining unit consisting of only one person. The union argues that sufficient positions presently exist in the bargaining unit to proceed to an election under the terms of the Stipulated Election Agreement.

[1] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed, except as otherwise indicated herein.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

II. DECISION

As stipulated by the parties at the hearing, it is concluded that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, yard/warehouse employees, and counter sales employees employed by the Employer at its Fort Wayne, Indiana, facility; BUT EXCLUDING all professional employees, office clerical employees, outside sales employees, inside sales employees,[2] and guards and supervisors as defined in the Act.

Further, for the reasons discussed in detail below, including the fact that Charles Ray Hoskin is not a supervisor within the meaning of Section 2(11) of the Act and is performing the work of the yard/warehouse employee, it is concluded that the bargaining unit found appropriate herein is not a prohibited one-person unit, and therefore the Board can proceed to an election and can appropriately certify the outcome of such an election.

The unit found appropriate herein consists of approximately two employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

Hughes Supply operates a facility in Fort Wayne, Indiana, that is primarily engaged in the wholesale distribution of construction and building materials, mainly water and sewer pipe and related fittings. The facility consists of a small office area and a yard used for storing the product. Joel Mallery has been the branch operations manager at the Fort Wayne facility for approximately six years, and now is primarily responsible for the operations side of the business.

At the time of the original Stipulated Election Agreement, in December 2003, the parties agreed to the inclusion of three positions in the bargaining unit: driver, yard/warehouse, and counter sales employees. At that time there was one employee occupying each position, for a bargaining unit consisting of three employees, as follows:[3]

John Widman	—	driver
Jarvis Kelsaw	—	yard/warehouse
Charles Ray Hoskin	—	counter sales

[2] Although not originally part of the Stipulated Election Agreement, the parties stipulated at hearing that the newly created inside sales position should be excluded from the appropriate bargaining unit.

[3] The parties agreed to the eligibility of these three employees through the use of a Norris-Thermador list executed at the same time as, and attached to, the Stipulated Election Agreement.

However, with the passage of time, the Employer restructured some of its operations, resulting in various changes affecting the employees that originally constituted the stipulated bargaining unit. Thus, in April 2005, Charles Ray Hoskin was promoted from counter sales to a newly created "warehouse supervisor" position and was given certain job functions with regard to the yard/warehouse employee, Jarvis Kelsaw. Hoskin also performed some yard/warehouse duties himself. The counter sales duties were shifted to a recently created inside sales position, with a few additional counter sales duties being performed by the branch operations manager. There is no evidence that the counter sales position will be filled by the Employer at any point in the immediate future. In July 2005, Kelsaw was laid off from his yard/warehouse position, and that position has remained vacant. The yard/warehouse duties performed by Kelsaw were shifted to Hoskin. Hoskin has not exercised any supervisory authority since Kelsaw's layoff in July 2005. John Widman remains to this day the only driver working out of the Employer's Fort Wayne facility. Both Widman and Hoskin report to the branch operations manager. Both the driver position occupied by Widman and the "warehouse supervisor" position occupied by Hoskin are paid an hourly rate, plus overtime. The record indicates that the driver position pays $11 to $12 per hour and that Hoskin is paid at approximately the same rate.

IV. DISCUSSION

A. "Warehouse Supervisor" Charles Ray Hoskin

At the time of the original Stipulated Election Agreement, Charles Ray Hoskin was working in the counter sales position. He had previously been promoted to that position after having spent approximately three years as a yard/warehouse employee. In April 2005, Hoskin was promoted to the newly created "warehouse supervisor" position based on his prior skills as a yard/warehouse employee and because he was not really a good fit in the counter sales position. In this new position, Hoskin allegedly had the authority to discipline the yard/warehouse employee Jarvis Kelsaw. The record, however, does not contain any evidence that Hoskin ever exercised this authority. Although the record is not clear on the exact details and timing, Hoskin did conduct an annual performance review of warehouse employee Kelsaw which resulted in Kelsaw being granted a wage increase. However, after Kelsaw was laid off in July 2005, Hoskin has not had any opportunity to exercise any of his supervisory authority. Since that time Hoskin's duties have primarily been those previously performed by the yard/warehouse employee. These duties consist of unloading material which comes in to the facility from a vendor, placing it in the warehouse, grouping materials for orders, and loading the truck for delivery. These duties require approximately 50%-60% of Hoskin's time. In addition, Hoskin has responsibility of the paper work involved in tracking the shipping and receiving aspect of the warehouse. Hoskin does this by entering shipping and receiving information in a computer. Hoskin is also charged with the maintenance of the forklift.

The parties stipulated at hearing that Hoskin was a Section 2(11) supervisor who therefore should be excluded from any appropriate bargaining unit. However, the stipulation entered into by the parties at hearing contained no factual basis for finding Hoskin to be a Section 2(11) supervisor. The Board has long held that a supervisory stipulation without supporting facts is insufficient, Red Lion, 301 NLRB 33 (1991), and therefore I reject the parties stipulation concerning Hoskin's supervisory status.

Further, despite the stipulation, evidence was adduced at the hearing concerning Hoskin's actual supervisory authority, and that evidence clearly demonstrates that Hoskin does not currently exercise any Section 2(11) indicia. Certainly for a period of time between April and July 2005, Hoskin had supervisory authority over the yard/warehouse employee position. However, that supervisory authority ended when Kelsaw was laid off. Since Hoskin's authority only extended to the yard/warehouse employee, and since that position has been vacant for nearly a year now with no reasonable expectation that the position will again be filled within the immediate future, Hoskin cannot be found to be a Section 2(11) supervisor. The status of a supervisor, under Board law, is determined by an individual's duties, not by his title or job classification, and it is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11). Chicago Metallic Corp., 273 NLRB 1677, 1688-89 (1985), enfd. 794 F.2d 527 (9th Cir. 1986). Further, in order to be deemed a supervisor within the meaning of Section 2(11), the Act requires that the individual exercise supervisory authority over other employees of the same employer. McDonnell Douglas v. NLRB, 665 F.2d 932, 936 (9th Cir. 1981); Douglas Aircraft Co., 238 NLRB 668, 671 (1978). Given the absence of any exercise of supervisory authority for the past year or any time in the foreseeable future by Hoskin over any employee of the Employer, I cannot find Hoskin to be a supervisor under the Act. In addition, the Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). In the present case, upholding the stipulation made at hearing when it is contrary to the evidence would amount to unfairly stripping Hoskin of his protections under the Act.

The Employer argues that although Hoskin does not have the ability to hire, discipline or discharge at the present time, he has the requisite authority to do so and therefore he should be found to be a supervisor according to Section 2(11) of the Act. In support of this argument the Employer cites Pepsi-Cola Co., 327 NLRB 1062 (1064). In Pepsi-Cola, the Board refused to draw a distinction between account representatives who in fact had exercised their authority to discharge and those who had not in a case where it had been determined that all account representatives possessed the same authority with respect to the discharge of merchandisers. Thus, in that case the Board determined that all account representatives who have merchandisers assigned to them were statutory supervisors as defined in Section 2(11) of the Act. The distinguishing factor here is that there is no evidence that Hoskin currently, or in the foreseeable future, has any employee of the Employer assigned to him over whom he possesses the authority to hire, discipline, discharge or perform or effectively recommend any of the Section 2(11) functions. The case of Pepsi-Cola clearly involves a group of employees possessing like authorities where some may not have had the opportunity to exercise such authority at the time of the hearing. This is not the situation in the instant case, and there is no indication that Hoskin will have the opportunity to exercise any such authority in the foreseeable future. Therefore, I cannot find that he is a statutory supervisor pursuant to Section 2(11) of the Act.

B. One-Person Bargaining Unit

Almost from its inception, the Board has held that it cannot certify a bargaining unit that consists of only one person. See, e.g., Luckenbach Steamship Co., 2 NLRB 181, 193 (1936). Further, if the Board cannot certify a one-person unit, it makes no sense to run an election where it has been found that the unit consists of only one person. The burden of proving the existence of a one-person unit is appropriately placed on the party making that assertion. See, e.g., Crispo Cake Cone Co., 190 NLRB 352 (1971). In the present case, the Employer has failed to demonstrate the unit found appropriate herein constitutes a one-person bargaining unit. There is no dispute that John Widman is performing the duties of a driver, and therefore should be eligible to vote in any election in the stipulated bargaining unit. Further, as I have found above, Charles Ray Hoskin is not a supervisor under the Act. Rather, Hoskin is instead spending a substantial portion of his time (as much as 60%) performing the duties and functions of a yard/warehouse employee, a classification included in the Stipulated Election Agreement and which the parties agree is the appropriate unit in this case. Therefore, it would appear that Hoskin would also be eligible to vote in any election held in the appropriate bargaining unit.

Having found two potentially eligible voters, I need not delve further into the one-person unit issue. I will therefore order an election in the unit found appropriate herein.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Chauffeurs, Teamsters and Helpers, Local Union No. 414, a/w International Brotherhood of Teamsters.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not

received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. See Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **July 12, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 19, 2006.

DATED AT Indianapolis, Indiana, this 5th day of July, 2006.

/s/ Rik Lineback

Rik Lineback
Regional Director
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